

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

COMMODITY FUTURES TRADING, COMMISSION

Plaintiff,

V.

**WALL STREET UNDERGROUND, INC.,
a Delaware Corporation, et al.,**

Defendants.

CIVIL ACTION

No. 03-2193-CM

ORDER

On August 22, 2005, this court issued a Memorandum and Order (“August 22, 2005 Order”) (Doc. 246) taking under advisement defendant Nicholas A. Guarino, Jr.’s Motion to Set Aside Default, Quash Service and Dismiss for Improper Service, Lack of Personal Jurisdiction and Failure to Serve, and also ordered Nicholas A. Guarino, Jr. to file an answer to plaintiff’s complaint by September 2, 2005.

On September 19, 2005, upon recognizing that defendant Guarino had not been sent a certified copy of the court's August 22, 2005 Order, the court sent copies of the court's August 16, 2006 Order denying defendant Guarino's motion to set aside the court's order directing service by publication (Doc. 245), the court's August 22, 2005 Order (Doc. 246), and the court's September 19, 2005 Order directing certified mail notice to defendant Guarino (Doc. 249), via certified mail to Nicholas A. Guarino, Jr. at 1828 University Place, Sarasota, FL, 34235. The court's September 19, 1995 Order also extended defendant Guarino's deadline for filing an answer to plaintiff's complaint until September 29, 2005. In both its August 22, 2005 and September 19, 2005 Orders, the court clearly stated that defendant Guarino's failure to file an answer by the prescribed deadline would result in the court denying defendant Guarino's motion to set

aside default. On October 17, 2005, the court received a certified mail receipt designating that defendant Guarino's certified mail was returned unclaimed. As of the date of this Order, defendant Guarino has not filed an answer to plaintiff's complaint.

The court acknowledges the likelihood that defendant Guarino, who now appears pro se, might not have received notice of the court's previous Orders. Indeed, the court's most recent certified mailing to defendant was returned unclaimed. Defendant Guarino, however, has been unavailable for some time; this court previously allowed service of process by publication to defendant Guarino after plaintiff's failed attempts to serve him. As a pro se defendant, defendant Guarino has a duty to update his address and, more importantly, actively defend his case. Thus, defendant Guarino's lack of notice is not a sufficient reason for the court to stray from its clearly-outlined directive that it would deny defendant Guarino's motion to set aside default if defendant Guarino did not answer plaintiff's complaint by September 29, 2005. As such, defendant Guarino's motion to set aside default is denied.

IT IS THEREFORE ORDERED that defendant Nicholas A. Guarino, Jr.'s Motion to Set Aside Default, Quash Service and Dismiss for Improper Service, Lack of Personal Jurisdiction and Failure to Serve (Doc. 209) is denied.

Dated this 21st day of October 2005, at Kansas City, Kansas.

s/ Carlos Murguia
CARLOS MURGUIA
United States District Judge